CHELLAPAH v. MALAYAN RAILWAY ADMINISTRATION

[O. C. J. (Spenser Wilkinson J.) March 4, 1949]

[K. L. — Civil Suit No. 36 of 1948]

Courts Ordinance, 1948 — Civil Procedure Code (Cap. 7), s. 597 — 1932 Rule 1, sub-r. 30 — Registrar's Appeal Rules, 1949 — Appeal from Registrar — Interrogatories — Law of discovery.

This was an application by way of appeal from the decision of the Registrar disallowing four interrogatories exhibited by the plaintiff for the interrogation of the defendants. It was argued for the appellants (1) that although the Registrar's Appeal Rules 1949 came into force after the date of the decision of the Registrar, nevertheless they had a right of appeal; (2) that the learned Registrar was wrong in disallowing the interrogatories.

Held: (1) the words of Registrar's Appeal Rules 1949 were sufficiently clear to show an intention to make them retroactive; (2) even if the words are not sufficiently clear, the general purpose of those rules as extracted from the rules themselves and from the substance of the legislation under which they are made, made that intention abundantly clear; (3) therefore an appeal lay from the decision of the Registrar although the decision was made before the rules were promulgated.

Held also: as the appellant was in effect asking for mere evidence of the facts in dispute and not a part of the facts themselves, the interrogatories were rightly disallowed by the Registrar.

Cases referred to:—

(1) *Phillips v. Eyre* L.R. 6 Q.B. 1 at p. 23.

(2) *Attorney-General v. Dyer* (1947) 1 Ch. 67 at p. 89; (1946) 2 All E.R. 252.

(3) *Colonial Sugar Refining Company Ltd. v. Irving* (1905) A.C. 469.

(4) *Director of Public Prosecutions v. Lamb* 31 Cox 483.

(5) *Attorney-General v. Gaskill* 20 C.D. 519 at p. 527.

(6) *Marriott v. Chamberlain* (1887) 17 Q.B.D. 163.

(7) *Thiagaraja Bhagavathar v. King-Emperor* L.R. 74 I.A. 132.

(8) *Chow E Wa v. Registrar of Titles & Ors. ante* p. 114.

(9) *Kong Wai & Ors. v. Public Prosecutor ante* p. 170.

APPEAL FROM REGISTRAR.

E. D. Shearn for plaintiff.

B. G. Shields for the defendants.

Spenser Wilkinson J. : — This was an application by way of an appeal from the decision of the Registrar disallowing four interrogatories exhibited by the plaintiff for the interrogation of the defendants. There were strictly speaking two consecutive applications before me and, therefore, for the purpose of an appeal in this case (should one be brought) there are in fact two separate decisions. As, however, the subject matter of both applications is precisely the same, the hearing was almost continuous and the matters are interconnected, I think it will be convenient for me to give my reasons for both decisions in one judgment.

The decision of the Registrar was made on the 15th February, 1949, and an application to appeal against his decision was filed on the same day. Mr. Shields who appeared for the defendants, the Railway Administration, took the preliminary objection that at the time when the plaintiff's appeal was filed no appeal lay. Mr. Shearn on behalf of the plaintiff relied upon the Registrar's Appeal Rules, 1949, made on the 17th February, 1949, and promulgated in the Government Gazette of the 18th February, 1949, and contended that these rules were retroactive in effect and enabled an appeal to be brought against the decision of the Registrar at any time on or about the 18th February, 1949.

Mr. Shields argued that when, on the 15th of February, the Registrar's decision was made there existed an order which was not appealable and that without express words in some law to this effect such an order could not be made appealable thereafter. He further argued that if these rules had been intended to be retrospective this would have been so provided in plain and unambiguous terms and he relied on *Phillips v. Eyre*[1].

In my opinion this argument is contrary to the well-known rule that alterations in procedure are retrospective unless there be some good reason against it. The rule is stated in the 9th Edition of *Maxwell* on Interpretation of Statutes at page 232 in the following words :—

> The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts;

and this statement of the law was approved by Evershed J. in his judgment in *Attorney-General v. Dyer*[2]. It is true that in *Colonial Sugar Refining Co. Ltd. v. Irving*[3] it was held that legislation which deprived a suitor in a pending action of an appeal which belonged to him as of right was not a matter regulating procedure, but the facts in the case before me are very different from the facts in that case. To deprive a suitor of an existing right of appeal requires, I think, much stronger words than to re-instate a right of appeal which has always existed except for a gap

of some six or seven weeks. Whether in fact it would have been possible before the 18th of February by reading together the provisions of sub-section (1) of section 10 of the Courts Ordinance, 1948, and section 597 of the Civil Procedure Code, to bring an appeal is a question which was not argued before me and I, therefore, do not have to decide. Mr. Shearn relied upon the wording of the rules themselves and the general principle that procedural provisions are retrospective.

Even in the case of penal provisions, where the wording is sufficiently clear and unambiguous retroactive effect will be given to the provision (see *Director of Public Prosecutions v. Lamb*[4]). The wording of the rule here in question is "any person affected by any order or decision of the Registrar ..... may appeal therefrom to a judge in chambers .....". In my opinion, the plaintiff is "a person affected" by a decision of the Registrar and may, therefore, appeal under the rules within five days from the date of decision or within such further time as may be allowed. I do not think the fact that the decision in this case was made before the rules were passed takes the plaintiff out of the plain meaning of those words.

If I were wrong in thinking that the meaning of the words was plain then one would be entitled, in view of the ambiguity, to look further into the matter and consider the circumstances in which the rules were made and their general purpose. Up to the 31st December, 1948, provision for appeals from the Registrar existed in the Courts Enactment, section 7(iii); and Rule 1 of 1932, sub-rule 30 made provision for the form of Notice of Appeal. The Courts Enactment was repealed by the Courts Ordinance, 1948, but, in my view, it is clear from the terms of section 10 of the Ordinance that the intention was to retain the right of appeal and to provide for the procedure in regard to such appeals by rules made under sub-section (2) of section 10. This view is supported by the fact that the new rules reproduce, practically verbatim, the provisions of sub-section 7(iii) of the Courts Enactment and sub-rule 30 of Rule 1 of 1932 above referred to. For some reason or other rules under sub-section 10(2) of the Ordinance were not made until the 17th February, 1949, although the Ordinance came into force on the 1st January, 1949. It seems clear in all the circumstances that the intention was that the right of appeal from the Registrar to the Judge should be continued. If, therefore, the words of the new rules are not of themselves sufficiently clear to show an intention to make them retroactive, the general purpose of those rules as extracted from the rules themselves and from the substance of the legislation under which they are made, makes that intention, in my opinion, abundantly clear.

For these reasons I held that an appeal lay from a decision of the Registrar although that decision was made before the rules were promulgated.

Having reached this decision I raised the question whether the notice given by the plaintiff, having been given before the rules came into effect was not a nullity and whether, therefore, a new notice might have to be filed and an application for leave to appeal out of time made. Mr. Shearn for the plaintiff, as I understood him, would have been prepared to argue that, as the old rules still continued notwithstanding the repeal of the Enactment, the notice might still be in order; but he was prepared to accept the view that the notice was out of order and to file a fresh application. As Mr. Shields was not prepared to proceed at once with the appeal on the plaintiff's undertaking to file the necessary documents, a short adjournment was granted to enable a new notice to be filed together with an application for leave to appeal out of time.

The plaintiff thereupon filed a new notice under the new rules and applied for extension of time and there being no objections raised the application was granted and hearing of the appeal upon this new notice was proceeded with.

The plaintiff sought to exhibit four interrogatories for the interrogation of the defendants. As the second and fourth of these, each depends upon the one immediately preceding it, it will be sufficient, for the purpose of this judgment, to deal with the matter on the basis of the first and third interrogatories. The interrogatories which the plaintiff thus sought to put to the defendants were as follows:—

"(1) Answer yea or nay did the Defendants themselves provide the lightermen referred to in paragraph 9 of the plaint.

(3) Answer yea or nay did the Defendants or their employees perform the services referred to in paragraphs 7 and 10 of the plaint."

As I understood the arguments of the plaintiff he sought to justify the interrogatories upon two grounds. The first was that the answer would assist him to prove his own case. The second was that he was entitled to know the case which he had to meet. I will dispose of the second of these grounds first. I must confess I am not much impressed with this argument in a case of the kind now before me. The plaintiff alleges that he has supplied lightermen and other labour for the carrying out of services on behalf of the defendants and that he is entitled to be paid

therefor, either under a contract subsisting between the parties for the supply of such labour or alternatively under circumstances which entitled him to payment under section 70 of the Contract Enactment. The defendants say that the plaintiff did not supply the labour as alleged or at all and alternatively, if he did supply it, it either came within the four corners of the contract and has already been paid for, or the supply of labour was not made in circumstances which render the defendants liable to pay therefor. This defence seems to me quite clear and unambiguous. What evidence the defendants will feel impelled to call in the rebuttal of the plaintiff's claim (if he succeeds in proving it) is a matter which probably cannot be decided until the plaintiff's evidence has been given and the defendants at the trial will be entitled to call any evidence which will help them to rebut and destroy the plaintiff's claim. They cannot, in my view, be asked to state, here and now, what sort of evidence they propose to use at the trial. I do not think the plaintiff is entitled to know anything more as to the case he has to meet than he knows already. Indeed I am somewhat surprised that the defendants have not asked for more information as to the plaintiff's case, which, as pleaded, seems to me to be far from precise. In so far as the interrogatories are based on the ground that the plaintiff wishes to know the case he has to meet, therefore, I would disallow them.

The other ground upon which Mr. Shearn based his right to put the interrogatories was that it would assist him to prove his own case. The Registrar had disallowed these interrogatories on the ground, *inter alia,* that it was for the plaintiff at the trial to prove his case; that this burden upon the plaintiff was a right of great value to the defendant and that, therefore, to allow the plaintiff to try and prove his case in advance of the trial by means of interrogatories would be oppressive. Mr. Shearn cited various English authorities for the proposition that far from this being a reason why interrogatories should not be allowed, it is one of the main purposes of interrogatories to enable the plaintiff to prove his case. It seems to me that there is no doubt that this submission is correct and I need not go into the authorities on this point. It is, I think, sufficient for me to quote the words of Jessel M.R. in his judgment in *Attorney-General v. Gaskill*[5] where he says :—

> It is because there is the obligation of proof on the plaintiff that they ask the question.

On this point, therefore, I am unable to agree with the decision of the learned Registrar.

The question then arises whether these interrogatories are proper questions to be asked to assist the plaintiff to prove his case. In the English case of *Marriott v. Chamberlain*[6] some very wide expressions are used in the judgment indicating that the law with regard to interrogatories is very sweeping Lord Esher M.R. says :—

> It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked.

I am in some doubt as to the extent to which I ought to follow too closely the English authorities regarding the admissibility of interrogatories. Mr. Shearn has pointed out that section 133 (iii) of the Civil Procedure Code is exactly the same as Order 31 Rule 2 of the English Rules of the Supreme Court and it would, therefore, appear at first sight logical that decided cases on the English rule would be good authority. With regard to our sub-section it must be borne in mind, however, that although in general the law of discovery here is very similar to the law of discovery in England the various rules and acts dealing with this subject appear in each country in an entirely different setting. In England actions are commenced by a writ and the pleadings consist of a statement of claim and of a defence and, often, subsequent pleadings. Here a suit is commenced by a plaint which has to be verified and the grounds of defence are contained in a written statement which also has to be verified. Moreover, these differences of procedure are deliberate and the Civil Procedure Code, which derives from the Indian Code, has been adopted as being more suitable to the conditions existing in this country than the English procedure. It has been held by the Court of Appeal here, following the Privy Council decision in *Thiagaraja Bhagavathar v. King-Emperor*[7] that it is unsafe to rely upon decisions based upon an act of another country however similar those provisions may be to the law here by reason of possible differences in other branches of the law. (*Chow E Wa v. Registrar of Titles & Ors.*[8]; *Kong Wai & Ors. v. Public Prosecutor*[9]). I think this particularly applies to the more technical details of the English procedure; and that, therefore, the English decisions whilst entitled to the greatest respect should be followed only with caution and due regard to the local circumstances. In any event, permission to exhibit interrogatories is largely discretionary. In my view, the Courts will be rather stricter in this country in exercising this discretion than would the Courts in England in a similar case.

However this may be, it is clearly stated in the extract above quoted from *Marriott v. Chamberlain*[6] that it is not permissible to ask what is mere evidence of the facts in dispute, not forming part of the facts

themselves. In my view this is what plaintiff is here endeavouring to do. I had some difficulty at first in understanding in what way the answers to these proposed interrogatories would assist in proving the plaintiff's case at all. Mr Shearn's contention, as I understood him, was that if he could obtain a definite statement from the defendants that they had not themselves performed the services alleged to have been performed by the plaintiff and had not procured anyone other than plaintiff to perform them then that would raise an inference that it must have been the plaintiff himself who performed such services. He would thus be able to prove part of his case by inference instead of calling evidence on this point.

I doubt whether, in any case, such interrogatories would be permissible, but I am quite satisfied that they are not permissible in the present case because of the form of the plaint. The interrogatories refer, in the first place, to "the lightermen referred to in paragraph 9 of the plaint" and secondly to "the services referred to in paragraphs 7 and 10 of the plaint." When one looks at the relevant paragraphs of the plaint and to the particulars thereunder all one can find is a general reference to "lightermen supplied" for certain sums between certain dates and to charges in respect of handling unspecified goods also between certain dates. The particulars given are, in each case, particulars of payments, not particulars of lightermen or services. To my mind, it is impossible to expect the defendants to give any kind of categorical answer in respect of such wide allegations. If the plaintiff was asking about the employment of a specified lightermen in respect of a specified journey on a specified day; or the handling of specified goods ex a specified ship on a specified day then one might have to consider whether or not it might not be necessary for the disposal of the suit or for saving costs to require an answer. But looking at the claims in the suit and the paragraphs of the plaint in respect of which the questions are asked, I am satisfied that the interrogatories are not such as the defendants ought to be asked to answer. I agree with the learned Registrar that these interrogatories are really in the nature of cross-examination.

Reference was made in the course of the arguments to a notice to admit facts which had been served by the plaintiff on the defendants and to the defendants' admissions thereon. I observe that in the notice to admit facts there is a paragraph to the effect that in default of the defendants giving the required admissions it is the intention of the plaintiff to apply for leave to deliver interrogatories. In my opinion, refusal by the defendants to admit facts is not a ground upon which interrogatories should be allowed and is quite irrelevant to that question. The penalty, if any, for failure to admit facts is provided for in section 149 (iii) of the Civil Procedure Code and is purely a matter of costs. The only way in which the question of admissions becomes relevant to the question of interrogatories is under section 133 (iii) of the Civil Procedure Code which provides that in deciding whether interrogatories should be allowed the Court shall take into account any offer which may be made by the party to be interrogated to make admissions. In this case the defendants have made certain admissions but because they have qualified them they are not quite in the form which the plaintiff likes. In my view, the fact that the defendants have made these admissions, even though they are in a qualified form, is an additional ground for refusing to allow the plaintiff to interrogate on the same points.

In conclusion I would refer to a passage in the grounds of decision of the learned Registrar which reads as follows :—

> "The plaintiff contends that although the answers will not go to prove his case they will help to corroborate plaintiff's version by raising the probabilities in his favour."

Before the Registrar, therefore, the plaintiff appears to have come very near to admitting that what he was asking for was "mere evidence of the facts in dispute but not a part of the facts themselves" within the *dictum* of Lord Esher above quoted.

Though for somewhat different reasons I have reached the same conclusion as was reached by the learned Registrar. His decision is, therefore, upheld and the interrogatories are disallowed.

Application dismissed.

Solicitors : *Shearn, Delamore & Co.*

WONG ENG FOOK v. HO KIAT MOI (f)

[A. Cr. J. (Russell J.) April 5, 1949]

[K. L. — Criminal Appeal No. 10 of 1949]

Criminal Procedure Code (Cap. 6), ss. 307 and 362(i) — Maintenance of wife — Appeal from order of Magistrate — Whether order of Magistrate was order in a criminal cause or matter — Courts Ordinance, 1948, s. 50(2).

In this case the appellant appealed against an order of the Magistrate at Kuala Lumpur who had ordered him to pay $80 within one week or in default undergo six weeks' imprisonment. The learned Magistrate had found that the appellant had wilfully neglected to comply with a previous order for maintenance of his wife and child. One of the questions to be decided was whether the appeal should have been made under s. 307 of the Criminal Procedure Code or under the Civil Procedure Code.